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U.S. Citizenship and Immigration Services
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 15 2010
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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a computational fluid dynamics (CFD) scientist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a copy of his newly-published book, a witness letter, and arguments from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on December 19, 2007. In a statement accompanying the initial filing of the petition, counsel stated:

> [The petitioner] has been working at [redacted] since November of 2005. He has contributed to several of the Company's projects, and has mastered one critical technology, namely the immersed boundary method. Also, [the petitioner] has worked on a project that was provided by the U.S. government. He had generated the mesh for the combustor during the initial part of the project – this is regarded as one of

> the major bottlenecks in any real-life, complicated Computational Fluid Dynamics (CFD) project. [The petitioner] is on the threshold of directly contributing to the U.S. government with his continuing research. However, many . . . government projects require the individual to possess at least a green card. It would be beneficial for the U.S. government if [the petitioner] is given a green card so that he can further improve the U.S. economy as well as work further on behalf of U.S. governmental agencies.
>
> . . . A U.S. worker would not have the knowledge and the experience of [the petitioner]. He has formulated his own theory as part of his fundamental research studies and it is a niche and high-technology area of Mechanical Engineering.
>
> [The petitioner] possesses expertise that is extremely difficult to obtain in his field anywhere in the world. . . . U.S. government agencies are interested in hiring someone that already possesses a green card, not someone to file the green card for.

Several witness letters accompanied the petition. [redacted] a lead software developer at [redacted] stated:

> I have known [the petitioner] professionally from the time he worked in [redacted] Between 1997 and 1999 I worked closely with him in a number of time-critical projects that spanned across a wide range of engineering applications. . . .
>
> Subsequent to his departure from [redacted] [the petitioner] . . . has made critical contributions to the field of particle dispersion by formulating novel mathematical techniques that complemented, and in many ways, enhanced conventional particle tracking methods.

[redacted] for engineering solutions at [redacted], stated that the petitioner "is an essential and irreplaceable member of our team" who "has already mastered one of our critical technologies" and "also contributed immensely to writing proposals successfully for our company."

[redacted] of Stanford University, where the petitioner earned his doctorate, stated:

> I have been well aware of [the petitioner's] achievements in both fundamental and applied research in atmospheric sciences during his stint as a doctoral student in our department. He made seminal contributions to turbulence modeling theory which is a notoriously difficult subject. Specifically, he developed the state-of-the-art in Lagrangian Stochastic Models for atmospheric dispersion of pollutants. He also demonstrated the practical application to his theory in environmental engineering by applying it to an airport region in an urban area. This work has been a big success that has gained him a lot of recognition and has established him as an expert in his field. . . .

> He was also recently invited by Los Angeles Airport to give a talk on his work on pollutant dispersion in airports. . . .
>
> Currently, [the petitioner] is working in [redacted], a small computational fluid dynamics company that does industrial projects for both the government and the industry. As the president of this company, I am seeing him taking a leadership role in the practical development of a very new and powerful technique known as the immersed boundary method. He is very quickly becoming an expert in the industrial application of this category of methods. Our company has a very strong collaboration with the leading Computational Fluid Dynamics (CFD) company in the World, [redacted] – we are currently developing and implementing this technology in their flagship code, Fluent[,] that is currently the most widely used commercial CFD code in the World. I envision that this method is going to be adopted as the method of choice by the industrial CFD community worldwide and [the petitioner] is playing a very important role in making this happen. . . .
>
> The sooner he gets permanent residence status, the better it is for the country. . . . The National Interest Waiver is the best option available to him as it can make him a permanent resident within a very short time.

With regard to the last sentence quoted above, the national interest waiver does not expedite the adjustment of status of an alien, such as the petitioner, from a country with oversubscribed second-preference employment-based immigrant visa numbers. While the waiver would allow the petitioner to bypass the labor certification process, it would have no effect on the cutoff date for visa number availability in the classification sought, and the waiver neither expedites nor assures the approval of an adjustment application. Furthermore, 8 C.F.R. § 204.5(d) sets the priority date when the labor certification application is accepted for processing, which offsets the processing time of that application. Therefore, the national interest waiver would not "make [the petitioner] a permanent resident within a very short time" compared to the standard job offer/labor certification process.

[redacted] now at Iowa State University, stated:

> I was [the petitioner's] PhD advisor while I was on the faculty at Stanford University. [The petitioner] completed his thesis on the subject of Lagrangian dispersion modeling in stratified turbulent flow. His work advanced the state of the art in this subject through the innovative development of a mathematical method to derive stochastic, Lagrangian model equations that were consistent with Eulerian statistics. This is outstanding and original research, which demonstrates a high degree of scientific capability.

[redacted] an assistant professor at Stanford and "one of the partners" in Cascade Technology, credited the petitioner with "original and lasting contributions to Lagrangian stochastic techniques for modeling turbulent dispersion of pollutants in the atmosphere."

[redacted] an assistant professor at Stanford and "the vice-president of the company that [the petitioner] is currently working in," stated that the beneficiary is "becoming an expert on . . . the immersed boundary (IB) method. It is widely believed that the entire industrial CFD modeling community worldwide is going to follow this approach."

The witnesses all have demonstrable ties to the beneficiary, mostly through Cascade Technology and/or Stanford University. Their statements do not reflect the impact of the petitioner's work outside of his collaborators and those with a demonstrated financial interest in his work.

The petitioner submitted copies of his doctoral dissertation, published journal articles and other materials. These materials establish the existence, but not the impact, of the petitioner's scholarly work. We note the petitioner's involvement in a presentation at Los Angeles International Airport, but this does not establish significant use of the petitioner's work outside of southern California where he studied and where he now works.

On January 15, 2009, the director requested "additional documentary evidence" to show the petitioner's "degree of influence on [his] field" "as of the petition priority date." The director stated that such evidence "may include, for example, copies of published articles that cite or otherwise recognize [the petitioner's] research achievements."

In response, counsel observed that the beneficiary's doctoral thesis, with some revisions, "is in the process of being printed as a book." The petitioner submitted a copy of the manuscript, but the book apparently had not been published yet. The petitioner did not establish that this work had already influenced the field even before its publication. Once again, its very existence is not evidence of impact or influence on the field.

The petitioner submitted copies of five published articles that contain citations of the beneficiary's work. One of the articles is by the petitioner, citing his own prior work, and another Stanford University researcher wrote one of the other articles. Two of the remaining three articles appeared after the petition's filing date, leaving one independent citation published before the petition's 2007 filing date. The evidence submitted does not indicate that others have frequently cited the petitioner's work before (or after) the filing date.

The director denied the petition on April 22, 2009, stating that the petitioner's minimal publication record and citation history fail to distinguish him from others working in his field. The director also noted that all the submitted letters were from witnesses with direct ties to the petitioner. On appeal, counsel states:

> The quality of research that is required to get the degree from Stanford University is of exceptionally high standard and is far higher than most of the schools in the country in this field. [The petitioner's] own research is on turbulence modeling theory, which is notoriously difficult and only a few people even venture to work on the theoretical side

> of turbulence. The success that [the petitioner] has achieved in his chosen topic firmly establishes his superiority over many of his peers in the turbulence community.
>
> Although important, the number of publications on its own is not a complete measure of the impact or usefulness of a scientist's research. The quality of the journals in which the work is published is much more important.

The assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Eligibility for the national interest waiver rests first and foremost on the merits of the individual alien. We will not approve the waiver based on the reputation of the university the beneficiary attended, the claimed difficulty of his chosen specialty, or the reputation of a journal that published his work. It is important to remember that universities and journals earn their reputation from the quality of work they produce. Counsel effectively argues the opposite, claiming that anyone who graduates from Stanford and publishes in *Physics of Fluids and the Atmospheric Environment* is presumptively a superior researcher on the basis of those credentials.

Counsel acknowledges the importance of citations, but asserts "it does take time for the work to get noticed." An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). Therefore, subsequent events cannot cause a previously ineligible alien to become eligible after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). We cannot and will not find that the petitioner was already eligible in 2007 based on speculation that his work will eventually "get noticed" at some unspecified future point in time. Counsel observes that the petitioner's "research is starting to get cited," and witnesses have stated that the beneficiary is "becoming an expert" in his specialty. These assertions indicate that the petitioner filed the petition prematurely. The waiver is for aliens who have had an impact, not those who hope to have one.

A new letter from [redacted] follows the same vein as counsel's arguments. [redacted] repeats the claim that a doctorate from Stanford requires "exceptionally high quality research," notes "the difficulty of the subject" that the beneficiary has chosen to pursue, and states that it is rare for a doctoral thesis to be published in book form. [redacted] states that, with the publication of the book, the petitioner's "work will be made easily accessible worldwide, and many can use the results of [the petitioner's] research." Availability does not equal influence, and we repeat that we will not approve a waiver based on the assertion that the beneficiary studied a difficult subject at a prestigious university and later published his work.

The petitioner has shown that his teachers, collaborators and employers are impressed with the quality of his work, and confident in his ability to make significant contributions to his field. The record, however, does not show that the petitioner's work was already seen as important or influential as of the petition's filing date. The petition, rather, rests on a combination of conjecture and appeals to the beneficiary's association with prestigious institutions. These factors cannot

suffice to establish eligibility for the waiver. We agree with the director's decision to deny the petition.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.